In reference to this ground, however, the learned deputy public prosecutor submitted that the law is now settled that the prosecution is not bound to produce all available eye witnesses, and though he has not cited any authority to me he undoubtedly had in mind the judgment of the then Court of Appeal in the case of *Khoon Chye Hin* v. *Public Prosecutor*.[3] At page 109 the following passage appears:—

"It is, of course, well settled that in a criminal case prosecuting counsel, provided there is no wrong motive, has a discretion as to whether or not to call any particular witness and in particulalr has a discretion not to call in support of his case a witness whom he does not believe to be a witness of truth."

Further down the column the following passage from the judgment of Lord Roche in the case of *Seneviratne* v. *R.*[4] at page 48 was cited:—

"Their Lordships do not desire to lay down any rules to fetter discretion on a matter such as this which is so dependent on the particular circumstances of each case. Still less do they desire to discourage the utmost candour and fairness on the part of those conducting prosecutions; but at the same time they cannot, speaking generally, approve of an idea that a prosecution must call witnesses irrespective of considerations of number and of reliability, or that a prosecution ought to discharge the functions both of prosecution and defence. If it does so confusion is very apt to result, and never is it more likely to result than if the prosecution calls witnesses and then proceeds almost automatically to discredit them by cross-examination."

The above judgment of the Judicial Committee of the Privy Council has been regarded as having finally settled this matter to the effect that although witnesses essential to the unfolding of the narrative on which the prosecution is based, must of course, be called by the prosecution whether the effect of their testimony is for or against the prosecution case, still speaking generally the prosecution is not bound to call all available eye witnesses irrespective of consideration of number and of reliability.

In my view having regard to the facts of this case, the prosecution had rightly exercised its discretion in not calling the wife of the complainant to give evidence.

I would therefore dismiss the appeal and confirm both conviction and sentence.

Appeal dismissed.

SAN SOO HA v. PUBLIC PROSECUTOR

[A.Cr.J. (Raja Azlan Shah J.) September 2, 1967]
[K.L. — Criminal Appeal No. 62 of 1967]

Penal Code, s. 454 — House breaking and theft — Possession of stolen goods nine weeks after commission of theft.

Penal Code, s. 411 — Retaining stolen property.

Criminal Law and Procedure — Search — Search list to be made — Irrelularity in search and failure to make a list of things seized in the course of search — Criminal Procedure Code (Cap. 6), s. 64.

Evidence — Statement of accused "the stolen money was kept in my room" — Whether admissible — Presumption — Evidence Ordinance, 1950, s. 27.

On the morning of July 7, 1965 a house was broken into and cash in currency notes, coins, a wrist watch and two plastic bags were stolen. On September 13, 1965 the appellant was arrested. He gave a statement to the police officer to the effect that "the stolen money was kept in his room". As a result of such information the appellant led a police party to his flat. There they recovered some cash wrapped and marked in paper wrapping with writing on each roll and also the bags which the complainant identified.

As a result the appellant was charged with housebreaking and theft of the property to a total value of $5,270 under section 454 of the Penal Code, alternatively with dishonestly retaining stolen property, to wit, cash $1,464.20 under section 411 of the Penal Code. He was convicted and sentenced to three years' imprisonment. He appealed.

It was argued on appeal that the statement of the appellant to the police leading to discovery i.e. "the stolen money was kept in my room" was prejudicial and that a search list as required by section 64 of the Criminal Procedure Code was not prepared by the officer who conducted the search.

Held: (1) the statement of the appellant, "the stolen money was kept in my room" could not be taken as a confession of guilt and, therefore, unobjectionable and admissible under section 27 of the Evidence Ordinance;

(2) the failure to comply with the provisions relating to search list may cast doubt upon the *bona fides* of the parties conducting the search and accordingly affords ground for scrutiny; but if after close scrutiny the court arrives at the conclusion that the stolen articles were recovered from the possession of the accused person, it is obviously no defence to say that the evidence was obtained in an irregular manner. There is nothing in the law which makes such evidence inadmissible.

Cases referred to:—

(1) *Wang Kia Heng* v. *Public Prosecutor* [1951] M.L.J. 109.

(2) *Rama* v. *State* A.I.R. 1952 Bom. 299.

(3) *Hashim & Anor.* v. *Public Prosecutor* [1956] M.L.J. 233.

(4) *Vidya Prakash* v. *State* A.I.R. 1954 Pepsu 72.

(5) *Mamun* v. *Emperor* A.I.R. 1930 Lah. 530.

(6) *Bashir* v. *Emperor* A.I.R. 1932 All. 185.

(7) *Bhattacharjee* v. *Emperor* A.I.R. 1940 Cal. 85.

CRIMINAL APPEAL.

V. Oorjitham for the appellant.

Zaiton binte Osman (Deputy Public Prosecutor) for the respondent.

Cur. Adv. Vult.

Raja Azlan Shah J.: This is an appeal against conviction and sentence.

The appellant was charged with housebreaking and theft of property to a total value of $5,270 under section 454 of the Penal Code, alternatively with dishonestly retaining stolen

property, to wit, cash $1,464.20 under section 411 of the Penal Code. At the end of the prosecution case the learned president found that a *prima facie* case under the principal charge was established. The facts justifying his conclusion can be summarised as follows. The complainant is an ice-seller residing at Pudu Road, Kuala Lumpur. He is also an agent selling Social Welfare Lottery tickets. In the course of his business both he and his wife had saved about $5,000, mostly in coins. The wife had in the past ten years kept the coins rolled in paper and had indicated on each roll the amount therein. On the morning of July 7, 1965 the house was broken into and the said coins and some currency notes as well as a Titus wrist watch were stolen. Two plastic bags were also missing from the said house. On September 13, 1965 the appellant was arrested. He gave a statement to a police officer to the effect that the stolen money was kept in his room. As a result of such information, the appellant led a police party to his flat at Jalan Pasar Bharu, Kuala Lumpur. In his room the police recovered two plastic bags in which were found the coins wrapped in paper with writing on each roll. In an almeirah nine $50 notes were also recovered. The writing on the rolls was sufficiently identified by the complainant's wife; so were the bags, one of which had been mended with thread by her.

The appellant in his defence stated that at the material time he was a stage man, living at the said flat with one Mr. Wong whose present whereabouts are unknown. He said that the money which was recovered by the police was his. The learned president considered the defence and gave the following explanation in his grounds of judgment:—

> "The accused in his defence attempted to offer explanation to court for his possession of the exhibits. I was satisfied that the explanation offered by the accused was untrue. He said he was a stage man and yet he was earning $300 to $350 a month. On 7.7.1965 he said he was working, but under cross-examination he said, 'On 7.7.1965 I cannot remember if I was working'. The accused's story was not only contradictory but was also inconsistent with innocence. His story was untrue. It did not raise any reasonable doubt in the prosecution case at all".

After properly directing his mind to the case of *Wang Kia Heng* v. *Public Prosecutor*,[1] he rejected the defence and sentenced the appellant to three years' imprisonment.

The judgment which has been attacked on a number of grounds can be summarised under three heads. First, that the facts do not justify the finding of guilt under section 454 of the Penal Code; secondly, that a piece of prejudicial evidence was admitted by the learned president; and thirdly, that a search list as required by section 64 of the Criminal Procedure Code was not prepared by the officer who conducted the search.

I shall take ground two first. In the court below, counsel for the appellant objected to the word "stolen" being admitted in evidence. The learned president nevertheless admitted the following statement of the appellant to the police officer: "the stolen money was kept in his room". On the legal position that arises in such circumstances there is a wealth of weighty Indian authorities. It is established law that such words as "I have concealed," "I have hidden,," "I have kept" are admissible in evidence as evidence as coming within the purview of section 27 of the Indian Evidence Act (see *Rama* v. *State* [2]). Thus, in the present case if the words used are "the money was kept in his room", they are admissible on the ground that those words distinctly and positively relate to the fact discovered and which is necessary to be proved in order adequately to explain such discovery. Does the inclusion of the word "stolen" provoke section 27 of the Evidence Ordinance? Reference was made by counsel to the local case of *Hashim & Anor.* v. *Public Prosecutor* [3] in which it was held that the words "used in the murder" were not admissible. The facts in that case are different from present consideration although the principles are of general application. In the final analysis each case of this kind depends on the particular facts to which the general principle must be applied. In a Pepsu High Court case the statement of the accused that he had concealed the abducted woman Mt. Surjit Kaur in the house of Gobind Singh and that he could get her recovered from that place was allowed under section 27 of the Indian Evidence Act. The court did not accept the suggestion that the words "abducted woman" connected that the woman had been abducted by the accused. They only meant "an abducted woman" and that the accused did not say that he had abducted the woman in which case perhaps that portion would have been liable to be excluded from consideration. (See *Vidya Prakash* v. *State* [4]). One of the cases referred to in that judgment is the case of *Mamun* v. *Emperor*.[5] There, the statement of the accused that he had buried the dead body of the murdered person at the place pointed out by him was held to be admissible under section 27 of the Indian Evidence Act. In the case before us the statement of the appellant, "the stolen money was kept in his room" cannot be taken as a confession of guilt. The appellant did not say that he stole the money, in which case, perhaps, that portion would be liable to be excluded from circulation. It only means "a stolen property". In my judgment that statement is unobjectionable.

The third ground of appeal is that the provisions of section 64 of the Criminal Procedure Code had not been complied with. In my view, the provisions of the section are to be strictly followed to the extent it is possible to ensure

that the incriminating articles obtained as a result of the search were recovered as alleged and leaves no room for doubt and to exclude the possibility of any concoction or malpractice of any kind. This section bears some resemblance to section 103 of the Indian Criminal Procedure Code which is more exhaustive than ours. Conviction or acquittal of an accused person invariably depends upon the credibility of witnesses as assessed by the trial court and never on the question whether a particular legal procedure has been complied with. The most that can be said about the failure to comply with the provision relating to search list is that it may cast doubt upon the *bona fides* of the parties conducting the search and accordingly afford ground for scrutiny; but if after close scrutiny the court arrives at the conclusion that the stolen articles were recovered from the possession of the accused person, it is obviously no defence to say that the evidence was obtained in an irregular manner. There is nothing in the law which makes such evidence inadmissible. (See *Bashir* v. *Emperor*;[6] *Bhattacharjee* v. *Emperor* [7]). In the present case the learned president had explored the evidence and came to the conclusion that the stolen articles were recovered from the possession of the appellant. I am therefore unable to see how the failure to prepare a search list by itself would entitle the appellant to an acquittal.

The facts do not justify the conclusion of guilt under section 454 of the Penal Code. Nine weeks is quite a long time to justify the presumption that the appellant stole the money. It is not possible to dismiss from my mind that during that period the stolen articles had not passed from hand to hand. Be that as it may, the facts favour the inference that the appellant dishonestly retained the stolen articles. It is my view that there is ample material before the court to justify the conclusion that the appellant dishonestly retained the stolen articles.

The conviction under section 454 of the Penal Code is therefore set aside.

Instead, I substitute it with a conviction under section 411 of the Penal Code.

The facts of this case do not justify a sentence of three years' imprisonment. A more appropriate sentence in the circumstances would be that of 18 months.

Order accordingly.

Solicitors: *Oorjitham & Lam.*

CHANG KIM SIONG v. PUBLIC PROSECUTOR

[F.C. (Pike C.J. (Borneo), Gill & Chang Min Tat JJ.) September 11, 1967]

[Kuching — Federal Court Criminal Appeal No. X. 20 of 1967]

Criminal Law and Procedure — Identification — Accused identified at identification parade by witness who previously had opportunity of seeing him at the police station — Identification vitiated — Circumstantial evidence must point only to guilt of accused.

Evidence — Circumstantial evidence — Onus on prosecution.

The appellant appealed against his conviction and sentence for murder. The substantial point for the consideration of the court was the evidence of identification of the accused by a prosecution witness, to the effect that the accused was the person alleged to be at a certain place and certain time on a certain date.

The fact was that this witness had been given an opportunity by the police to see the accused prior to the formal identification at the identification parade.

Held: (1) since the witness had opportunity to see the accused beforehand, the evidence of subsequent identification at the parade by him was vitiated;

(2) the other evidence being of a circumstantial nature, it could not be said that such evidence pointed irresistably to the guilt of only the accused;

(3) the onus on the prosecution when the evidence is of a circumstantial nature is a very heavy one and that evidence must point irresistably to the conclusion of the guilt of the accused.

FEDERAL COURT.

S. K. Reddi for the appellant.

C. J. Millar (Deputy Public Prosecutor) for the respondent.

Pike C.J. (Borneo): The appellant has appealed against his convictcion and sentence for murder.

We are indebted to counsel for the appellant and to counsel for the prosecution for their assistance. It has seemed to us that there is really only one point in this case which deserves the careful consideration of the court, and that is the question of the evidence of identification of the accused as the person alleged to be at the bridge on the 28th of December.

If the accused had been identified at an identification parade by the witness, Simon Liew, without that witness having been first afforded the opportunity of seeing the accused, we feel that there might well be sufficient evidence to justify the conviction. The onus on the prosecution when the evidence is of a circumstantial nature is a very heavy one and that evidence must point irresistably to the conclusion of the guilt of the accused. If there are gaps in it then it is not sufficient. The fact that Simon Liew was invited to the police station to identify the accused not only in our opinion vitiates the subsequent identification at the parade, but raises the most grave doubts as to the whole of his evidence of identification, particularly bearing